Supreme Court, U.S.
FILED
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No. 94-

Supreme Court of the United States

Term October 1994

Roger W. Knight, petitioner

v.

Commissioner of Internal Revenue, respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I. Questions Presented For Review

A. Child support has never been considered a purely economic matter. Is the tax treatment of child support, 26 U.S.C. §152(e), subject to the ban on irrebuttable presumptions and thus by its terms in violation of the Fifth Amendment requirement for due process of law?

B. Is 26 U.S.C. §152(e) a bill of attainder prohibited by Article I Section 9 clause 3 of the Constitution?

C. Do 26 U.S.C. §§71 and 215 deny equal protection of the laws to parents who pay child support by denying deductions for child support paid while allowing deductions for alimony paid in violation of the Fifth Amendment?

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IV. Decision Below

The memorandum decision of the court of appeals has not been noted at the time of this printing. The Tax Court memorandum opinion is published at 64 T.C.M. 1519.

V. Statement of Grou[illegible] For Jurisdiction of this Court

The memorandum below was filed by the court of appeals on June 24, 1994. This Petition for Writ of Certiorari is presented within 90 days of the memorandum decision. This Court has jurisdiction to review this decision under 28 U.S.C. §1254(1).

VI. Laws Involved in this Case

Provisions of the United States Constitution

Article I Section 9 Clause 3

No Bill of Attainder or ex post facto Law shall be passed.

Fifth Article of Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or

public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Ninth Article of Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Laws of the United States

26 U.S.C. §71. Alimony and separate maintenance payments

(a) General rule

Gross income includes amounts received as alimony or separate maintenance payments.

(b) Alimony or separate maintenance payments defined

For purposes of this section-

(1) In general

The term "alimony or separate maintenance payment" means any payment in cash if-

(A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,

(B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215,

(C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and

(D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.

(2) Divorce or separation instrument

The term "divorce or separation instrument" means-

(A) a decree of divorce or separate maintenance or a written instrument incident to such a decree,

(B) a written separation agreement, or

(C) a decree (not described in subparagraph (A)) requiring a spouse to make payments for the support or maintenance of the other spouse.

(c) Payments to support children

(1) In general

Subsection (a) shall not apply to that part of any payment which the terms of the divorce or separation instrument fix (in terms of an amount of money or a part of the payment) as a sum which is

payable for the support of children of the payor spouse.

(2) Treatment of certain reductions related to contingencies involving child

For the purposes of paragraph (1), if any amount specified in the instrument will be reduced-

(a) on the happening of a contingency specified in the instrument relating to a child (such as attaining a specified age, marrying, dying, leaving school, or a similar contingency), or

(B) at a time which can clearly be associated with a contingency of a kind specified in subparagraph (a),

an amount equal to the amount of such reduction will be treated as an amount fixed as payable for the support of children of the payor spouse.

(3) Special rule where payment is less than amount specified in instrument

For purposes of this subsection, if any payment is less than the amount specified in the instrument, then so much of such payment as does not exceed the sum payable for support shall be considered a payment for such support.

(d) Spouse

For purposes of this section, the term "spouse" includes a former spouse.

26 U.S.C. §152 Exemptions for dependents

(e) Support test in case of child of divorced parents, etc.

(1) Custodial parent gets exemption

Except as otherwise provided in this subsection if-

(A) a child (as defined in section 151(c)(3)) receives over half of his support during the calendar year from his parents-

(i) who are divorced or legally separated under a decree of divorce or separate maintenance,

(ii) who are separated under a written separation agreement, or

(iii) who live apart at all times during the last 6 months of the calendar year, and

(B) such child is in the custody of one or both of his parents for more than one-half of the calendar year,

such child shall be treated, for purposes of subsection (a), as receiving over half of his support during the calendar year from the parent having custody for a greater portion of the calendar year (hereinafter in this subsection referred to as the "custodial parent").

(2) Exception where custodial parent releases claim to exemption for the year

A child of parents described in paragraph (1) shall be treated as having received over half of his support during a calendar year from the noncustodial parent if-

(A) the custodial parent signs a written declaration (in such manner and form as the

Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and

(B) the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year.

26 U.S.C. §215 Alimony, etc., payments

(a) General rule

In the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year.

(b) Alimony or separate maintenance payments defined

For purposes of this section, the term "alimony or separate maintenance payment" means any alimony or separate maintenance payment (as defined in section 71(b)) which is includible in the gross income of the recipient under section 71.

(c) Requirement of identification number

The Secretary may prescribe regulations under which-

(1) any individual receiving alimony or separate maintenance payments is required to furnish such individual's taxpayer identification number to the individual making such payments, and

(2) the individual making such payments is required to include such taxpayer identification number on such individual's return for the taxable year in which such payments are made.

(d) Coordination with section 682

No deduction shall be allowed under this section with respect to payment if, by reason of section 682 (relating to income of alimony trusts), the amount thereof is not includible in such individual's gross income.

VII. Statement of the Case

In 1990, after an automatic extension, Mr. Knight filed his tax return for 1989.

On January 24, 1992, the Internal Revenue Service served on Mr. Knight a Notice of Deficiency for Tax Year 1989. This is authorized by 26 U.S.C. §6212.

On March 2, 1992, Mr. Knight filed a Petition for Redetermination with the Tax Court, No. 4755-92. The Tax Court had jurisdiction under 26 U.S.C. §6213(a).

On December 15, 1992, the Tax Court issued a memorandum opinion, T.C. Memo. 1992-710, 64 T.C.M. 1519, App. pp. 8-23.

On October 18, 1993, the Tax Court filed its Decision, App. p. 7.

On November 8, 1993, Mr. Knight appealed to the Ninth Circuit Court of Appeals, No. 93-70917.

The court of appeals had jurisdiction under 26 U.S.C. §7482(a).

On June 24, 1993, the court of appeals filed the memorandum affirming the tax court's decision. App. pp. 1-6.

VIII. Argument for Allowance of the Writ

A. Irrebuttable Presumption, Due Process

The plain language of the Fifth Amendment provides that no person shall be deprived of property without due process of law. If a person is deprived of property by a legislative presumption which is irrebuttable or conclusive, this provision is violated.

The limitation of the irrebuttable presumption doctrine in purely economic matters meets all of the requirements for reversal defined by Justice O'Conner in *Planned Parenthood v. Casey*,(1992) 120 L. Ed. 2d. 674, 112 S. Ct. 2791, 2814. The decision must be obviously wrong and otherwise there must be compelling reasons for reversal.

This is clearly the case with *Michael H. v. Gerald D.*,(1989) 491 U.S. 110, 105 L. Ed. 2d. 91, 109 S. Ct. 2333; *Usery v. Turner Elkhorn Mining Co.*,(1976) 428 U.S. 1, 49 L. Ed. 2d. 752, 96 S. Ct. 2882; and *Weinberger v. Salfi*,(1975) 422 U.S. 749, 45 L. Ed. 2d. 522, 95 S. Ct. 2457. Many people use "original intent" to argue against protecting abortion and other rights not enumerated in the Constitution. This approach ignores two important factors: (1) the

Ninth Amendment provides for unenumerated rights that can be included in the word "liberty" in both Fifth and Fourteenth Amendments; and (2) The "original intenders" were not "staunch conservatives" but a bunch of revolutionaries who successfully fought tyranny.

They were unalterably opposed to government arbitrarily taking any person's life, liberty, or *property*. That is why they prohibited bills of attainder, ex post facto laws, laws that impair contracts, excessive fines and bails, and the taking of property without just compensation. The First Congress clearly intended the requirement for due process to support all of these other constitutional protections of property.

The *Federalist Papers,* Nos. 30-36 argued that the power to lay and collect taxes is a necessity. But they promised that this power was checked by the requirement for uniformity to provide for the fair and orderly raising of revenue and to avoid plundering by government to meet its needs. *Federalist Paper* 35 warned specifically against the evil of unequal taxation among the states and *among the citizens of each state.*

The greatest objection to the Constitution that Alexander Hamilton had to overcome was the reasonable fear of the awesome power of taxation. The second objection was the lack of a bill of rights, to protect against that taxing and other powers of the proposed federal government. The power to tax is

thus clearly checked and regulated by Article I Section 9 and by the Bill of Rights as these measures were enacted to specifically meet these objections.

Therefore, for this Court to define marriage, procreation, and abortion to be fundamental rights protected by the Ninth Amendment and by substantive due process is not inconsistent with the original intent. But to abandon the prohibition of irrebuttable presumptions is contrary to original intent.

While this Court can use this case to reverse *Michael H., Turner Elkhorn*, and *Salfi*, it does not need to in order to reverse the Ninth Circuit's dangerous tendency to find that every irrebuttable presumption that affects property is a purely economic matter. Anything that adversely affects the noncustodial parent will make his compliance with a support order LESS likely. Child support is NOT a purely economic matter.

It is enforced to promote the compelling interest government has in the support of its children as found by this Court in *Jones v. Helms*,(1981) 452 U.S. 412, 423, 69 L. Ed. 2d. 118, 101 S. Ct. 2434. Child support was once considered an element of alimony, the distinction being a 20th century invention. Prior to the rise of no fault divorce laws and the decisions of this Court that marriage and procreation are fundamental rights, alimony was considered not founded upon a contract, but to be a

penalty imposed for failure to perform a duty. *Barclay v. Barclay*,(1900) 184 Ill. 375, 56 N.E. 636, 637 cited in *Audobon v. Shufeldt*,(1901) 181 U.S. 575, 579, 45 L. Ed. 1009, 21 S. Ct. 735; *Wetmore v. Markoe*,(1904) 196 U.S. 68, 73, 49 L. Ed. 390, 25 S. Ct. 172; and *In re Cave*,(1901) 26 Wash. 213, 216, 66 P. 425.

If a support order is a *penalty* and therefore not dischargeable through bankruptcy and support debtors are not protected by state constitutions that prohibit imprisonment for debt; then the irrebuttable presumption doctrine must apply. If child support is deemed an obligation that attaches to the exercise of the fundamental right to procreate, then an irrebuttable presumption in the tax laws that said parent did not support the child, which further burdens the parent financially, making compliance with a support order less likely is not a purely economic matter in that it affects a fundamental right. This places the conclusive presumption of 26 U.S.C. §152(e) squarely in the mold of *Stanley v. Illinois*,(1972) 405 U.S. 546, 31 L. Ed. 2d. 551, 92 S. Ct. 1208 and *Vlandis v. Kline*,(1973) 412 U.S. 441, 37 L. Ed. 2d. 63, 93 S. Ct. 2230.

Vlandis did involve an economic matter, out of state versus in state tuition rates. But it also involved the constitutional right to travel and the issue of opportunity to education. Equating a case involving a conclusive presumption in a purely economic matter with cases in the mold of *Stanley*

and *Vlandis* is found to be in error in *Turner Elkhorn* at 428 U.S. 22.

Heiner v. Donnan,(1932) 285 U.S. 312, 324-329, 76 L. Ed. 772, 52 S. Ct. 358 is the classic decision establishing that irrebuttable presumptions are void as contrary to the requirement for due process of law and that the Fifth and Fourteenth Amendments provide identical protections as to due process.

Heiner, Hoeper v. Tax Commission,(1931) 284 U.S. 206, 76 L. Ed. 248, 52 S. Ct. 120 and their progeny: *Skinner v. Oklahoma*,(1942) 316 U.S. 535, 544, 86 L. Ed. 1655, 62 S. Ct. 1820; *Aptheker v. Secretary of State*,(1964) 378 U.S. 500, 511, 12 L. Ed. 2d. 992, 84 S. Ct. 1659; *Carrington v. Rash*, (1965) 380 U. S. 89, 96, 13 L. Ed. 2d. 675, 85 S. Ct. 775; *Shapiro v. Thompson*,(1969) 394 U.S. 618, 631, 22 L. Ed. 2d. 600, 89 S. Ct. 1322; *Bell v. Burnson*,(1971) 402 U.S. 535, 29 L. Ed. 2d. 90, 91 S. Ct. 1586; *Reed v. Reed*,(1971) 404 U.S. 71, 76, 30 L. Ed. 2d. 225, 92 S. Ct. 251; *Weber v. Aetna Casualty & Surety Co.*, (1972) 406 U.S. 164, 31 L. Ed. 2d. 768, 92 S. Ct. 1400; *Fuentes v. Shevin*,(1972) 407 U.S. 67, 92-93 note 29, 32 L. Ed. 2d. 556, 92 S. Ct. 1983; *United States Department of Agriculture v. Murry*,(1973) 413 U.S. 508, 37 L. Ed. 2d. 767, 93 S. Ct. 2832; *Sugarman v. Dougall*,(1973) 413 U.S. 634, 646-647, 37 L. Ed. 2d. 853, 93 S. Ct. 2842; *Cleveland Board of*

Education v. LaFleur, (1974) 414 U.S. 632, 39 L. Ed. 2d. 52, 94 S. Ct. 791; *Jimenez v. Weinberger,*(1974) 417 U.S. 628, 636, 41 L. Ed. 2d. 363, 94 S. Ct. 2496; *Hampton v. Mow Sun Wong,*(1976) 426 U.S. 88, 101 note 20, 48 L. Ed. 2d. 495, 96 S. Ct. 1895; *Matthews v. Lucas,*(1976) 427 U.S. 495, 49 L. Ed. 2d. 651, 96 S. Ct. 2755; *Craig v. Boren,*(1976) 429 U.S. 190, 50 L. Ed. 2d. 397, 97 S. Ct. 451; and *Trimble v. Gordan,*(1977) 430 U.S. 762, 770-771, 52 L. 2d. 31, 97 S. Ct. 1459 apply the irrebuttable presumption doctrine to a variety of situations that arise under law.

Particularly relevant to the issue of whether the irrebuttable presumption doctrine applies to the tax treatment of child support are *Schlesinger v. Wisconsin,*(1926) 270 U.S. 230, 240, 70 L. Ed. 557, 46 S. Ct. 260 and *Heiner*, taxes imposed upon property transferred from the parent to the child prior to death of the parent; *Hoeper*, state income tax on wife's separate property payable by husband; *Reed*, gender preference in the administration of an estate of a deceased child; *Stanley,* fitness of an unwed father as parent; *Weber*, *Jimenez,* and *Matthews*, dependence of illegitimate child on deceased father for determining insurance benefits; *Murry*, food stamp eligibility of household that included a 19 year old receiving child support; *Trimble*, inheritance by intestate succession by illegitimate children; and *Zablocki v. Redhail*, (1978)

434 U.S. 374, 390, 402-403, 405-406, 54 L. Ed. 2d. 618, 98 S. Ct. 673: presumption that marriage will reduce ability to comply with a support order is found to be constitutionally defective.

Matthews, Trimble, Zablocki, Mow Sun Wong, and *Craig* were decided after *Salfi* and either contemporary or subsequently to *Turner Elkhorn*. *Mow Sun Wong* involved civil service employment by resident aliens and *Craig* involved gender distinction in setting the legal drinking age. The irrebuttable presumption doctrine has not been abandoned or even as severely limited as found by the court of appeals.

The finding by the court of appeals and the Tax Court that Congress had a legitimate interest in relieving the Internal Revenue Service of the burden of arbitrating disputes between parents as to which parent provided more than one half of the child's support, App pp. 4, 16-17, is in direct conflict with *Reed* at 404 U.S. 76 and *Stanley* at 405 U.S. 656-657. Furthermore, it ignores the less drastic means that Congress had in treating child support the same as alimony. The Internal Revenue Service would not have to serve as an arbitrator if Congress did not set up the dispute in the first place. If the custodial parent has to include child support actually received as gross income, then of course she should be entitled to the exemption for each child thus supported. And as an added bonus, it would grant a *positive* incentive for the noncustodial parent to pay

child support. If the support of children justifies contempt proceedings, then why not a tax deduction for all support actually paid?

Less drastic means test such as this is applied throughout *Zablocki, supra.*

While not mentioned in the decisions below, the federal government has argued that Mr. Knight can seek in state court an order requiring his ex-wife to sign over the personal exemptions for his children and to enforce such order with civil contempt proceedings. Mr. Knight replied that his ex-wife need only to remain in jail until April 16 to defeat such a strategy.

But Congress did not authorize in 26 U.S.C. §152(e) any such remedy by state courts. State courts certainly cannot enjoin the collection of federal taxes or order any refund of federal taxes collected, as the United States has not consented to such liability. For a state court to instruct any citizen on how to prepare her federal tax papers may be in direct conflict with §152(e) and the Constitution. Congress cannot delegate to the states, nor can the states usurp, the authority to interpret federal tax law and determine who owes what tax, without violating the requirement for uniformity in Article I Section 8 clause 1! A tax cannot operate with the same force an effect in every place where the subject of it is found if each state has the power to interpret it. See *Head Money Cases*,(1884) 112 U.S. 580, 594, 28 L. Ed. 798, 5 S.

Ct. 247. The purpose of replacing the Articles of Confederation with the Constitution is to free the federal government from dependence on the states for revenue and to free the states from obligation to collect the revenue for the federal government.

Mr. Knight is thus faced with an irrebuttable presumption in 26 U.S.C. §152(e) that deprives him of his property and renders more difficult his compliance with a support order. A writ of certiorari is therefore indicated.

B. Bill of Attainder

> Bills of attainder, ex post facto laws, and laws impairing the obligations of contracts, are contrary to the first principles of the social compact and to every principle to sound government.
>
> *Federalist Paper* No. 44

Who can doubt the wisdom of Alexander Hamilton? Jim Crow laws, the internment of persons of Japanese ancestry, and the ban on homosexuals in the military can all be reasonably challenged as bills of attainder.

The four laws held by this Court to be bills of attainder included irrebuttable presumptions. *Cummings v. Missouri*, (1867) 71 U.S.(4 Wall.) 277, 18 L. Ed. 356 invalidated the irrebuttable presumption that those who aided the Confederate States were not fit to practice certain professions, including clergyman. *Ex parte Garland*,(1867) 71

U.S.(4 Wall.) 333, 18 L. Ed. 366 invalidated the irrebuttable presumption that those who aided the Confederate States were not fit to practice law before the courts of the United States. *United States v. Lovett*,(1946) 328 U.S. 303, 90 L. Ed. 1252, 66 S. Ct. 1073 invalidated the irrebuttable presumption that three named individuals were subversives. *United States v. Brown*,(1965) 381 U.S. 437, 14 L. Ed. 2d. 484, 85 S. Ct. 1707 invalidated the irrebuttable presumption that members of the Communist Party posed a risk of political strikes if allowed to be officers or employees of labor unions.

A state court found invalid as a bill of attainder a law that imposed liability for actions of a child upon the parent solely on the basis of the parent and child relationship. Involved was the irrebuttable presumption that the custodial parent contributed to the objectionable behavior of the child. *Owens v. Ivey*,(1988) 525 N.Y.S. 2d. 508, 515-516. At 515 it cites *Nixon v. Administrator of General Services*, (1977) 433 U.S. 425, 475-480, 53 L. Ed. 2d. 867, 97 S. Ct. 2777 in its analysis of whether the statutory sanction is punishment for the purpose of bill of attainder analysis.

Owens boiled the *Nixon* tests for punishment down to:

1. Whether the law requires traditionally recognized punishments.
2. Whether it furthered punitive purposes generally.

3. Whether legislature intended to punish.

Judge John Manning Regan held the New York law unconstitutional as a bill of attainder because it provided a minimum monetary penalty to be paid by the parent, solely on the basis of the parent and child relationship. Such corruption of blood is a historical dimension of bill of attainder. *Owens, supra* at 515-516.

Child support statutes in their present form clearly meet these tests, if they constitute a form of punishment or are used to serve punitive purposes. They irrebuttably impose what Justice Brennan found in *Rivera v. Minnich*,(1987) 483 U.S. 574, 583-586, 97 L. Ed. 2d. 473, 107 S. Ct. 3001 to be an onerous burden. They take property from A and give it to B, which Justice Chase found to be beyond the authority of the legislature in *Calder v. Bull*,(1798) 3 U.S.(3 Dall.) 386, 388, 1 L. Ed. 648.

As already shown, denying discharge through bankruptcy of support debt and denying support debtors the protection of state constitutions that prohibit imprisonment for debt is justified on the grounds that support is a PENALTY. Either it is or it is not. If it is, then child support statutes, or at least those provisions that give it punitive effect, are bills of attainder. No bill of attainder can by its legislative judgment provide any rational basis for statute or any compelling interest of government; it is the legislative judgment that is forbidden.

The question for this Court to answer is: does 26 U.S.C. §152(e) serve or exacerbate punitive purpose? Can it be rationally related to any nonpunitive purpose? Its denial of the personal exemption to those who pay child support is based upon a legislative judgment that they do not provide more than one half of the support of their children unless the custodial parent so declares. This makes her a judge in her own cause, which is also beyond the authority of the legislature, *Calder, supra* at 3 U.S. 388.

As already argued, 26 U.S.C. §152(e) denies any recourse to the noncustodial parent when the custodial parent refuses to sign over the exemption, even in violation of a state court order. Such state court order which may be unconstitutional.

If a noncustodial parent refuses to comply with a support order, he can be punished for contempt under Washington's RCW 26.18.050 and similar laws in other states. If he crosses state lines, he can be prosecuted for the crime defined by 18 U.S.C. §228. 26 U.S.C. §152(e) irrebuttably presumes that all noncustodial parents unable to get the custodial parents to testify otherwise, are guilty of nonpayment of support. This is something Congress and the states have deemed worthy of *punishment*. The tax punishes by deprivation of property, which is a historical punishment of bills of attainder and bills of pains and penalties. Denying the noncustodial parent the personal exemption for

supporting his children while forcing him to pay taxes on the money he earns to pay the support is certainly not rationally related to any nonpunitive purpose of securing the support of the child.

26 U.S.C. §152(e) is a legislative act.

Noncustodial parents who pay child support are easily ascertainable members of a group of persons.

26 U.S.C. §152(e) inflicts punishment by deprivation of property for nonpayment of support without any judicial trial.

In *Lovett, supra* at 328 U.S. 315 and in *Brown, supra* at 381 U.S. 448-449, this Court defined bills of attainder to include:

> Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial.

A writ of certiorari is thus indicated.

C. Equal Protection

In *Planned Parenthood, supra,* this Court reaffirmed the findings in *Roe v. Wade*, (1973) 410 U.S. 113, 35 L. Ed. 2d. 147, 93 S. Ct. 705; *Eisenstadt v. Baird*,(1972) 405 U.S. 438, 31 L. Ed. 2d. 147, 93 S. Ct. 705; and *Griswold v. Connecticut*,(1965) 381 U.S. 497, 14 L. Ed. 2d. 510, 85 S. Ct. 1687 that choice in abortion and birth control are fundamental rights protected by

substantive due process. The right to procreate is also a fundamental right in *Skinner v. Oklahoma,* (1942) 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1820. That it exists in men and women, that a woman has as much right to carry her child to term and to marry the child's father as to abort is eloquently declared by this Court in *Zablocki, supra* at 434 U.S. 384-386. *Zablocki* and *Loving v. Virginia,*(1967) 388 U.S. 1, 18 L. Ed. 2d. 1010, 85 S. Ct. 1817 recognized marriage to be a fundamental right.

Freedom of choice in procreation and in marriage are closely related and each is dependent of the existence of the other. There is no rational basis for any distinction between marriage and procreation as to rights and duties. Alimony is a duty imposed for having married, child support for having procreated. Both serve the purpose of providing for the parties less able to provide for themselves. The denial of the protection of state constitutions that prohibit imprisonment for debt and of dischargeability through bankruptcy is applied to both alimony and child support without distinction.

The lower courts' findings that child support and alimony serve different purposes is in error to the extent that the distinction is usually blurred in practice. The standard of living of the child cannot be separated from the standard of living of the parent with whom the child is residing. The Ninth Circuit upheld a Washington law that increased child support obligations for the purpose of standard of

living in *P.O.P.S. v. Gardner*, (CA9 1993) 998 F. 2d. 764, 767. Furthermore, 18 U.S.C. §228 provides that refusing to pay support ordered for a child out of state and *for the parent with custody of that child* is a crime.

The only place in the law that treats alimony differently than child support is at 26 U.S.C. §§71 and 215. There is no rational basis for this distinction. The Tax Code gives a substantial positive incentive for the payment of alimony: full deduction of all alimony actually paid. But it denies noncustodial parents this same incentive. Forcing these parents to pay taxes on income they earn to pay support causes many to be both *unable* and unwilling to pay child support.

Fundamental rights are clearly involved here and the court of appeals' refusal to apply the strict scrutiny standard is in direct contradiction to *Zablocki v. Redhail.*

No rational basis can possibly exist for encouraging the payment of alimony and for discouraging the payment of child support. The statutes in question and the decisions below are patently irrational.

A writ of certiorari is therefore indicated.

D. Precedent is Set, Review is Urgent

The Tax Court memorandum opinion at 64 T.C.M. 1519 sets a precedent that it can cite against other noncustodial parents who make the same

challenge. Tax Court jurisdiction exists only upon the issuance of a notice of deficiency. A taxpayer's only other recourse is a refund suit in the Claims Court or the local district court. Because of the huge obligations imposed upon noncustodial parents, paying the taxes due on the income they earn to pay support to set up a refund suit is problematical.

Ninth Circuit Rule 36-3 provides that unpublished decisions shall not be cited as precedent, but the Tax Court cites its opinions affirmed by unpublished decision. App. p. 19 for citation of *Johnson v. Commissioner*, T.C. Memo 1978-32, 37 T.C.M. 189, noted as affirmed on 624 F. 2d. 192. While this case sets up half of any circuit split in these issues, it may be a long time before a circuit other than the Ninth disagrees. Meanwhile, noncustodial parents will continue to fail or refuse to comply with their support orders in part because of 26 U.S.C. §§71, 152(e), and 215. Considerable suffering on the part of both noncustodial parents and their children will continue.

The Tax Court set precedent to urgent issues of family law, taxes, and the Constitution. We need a decision by this Court on these issues without further delay.

IX. Conclusion

For the reasons stated herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROGER W. KNIGHT,	)	
Petitioner-Appellant,	)	No. 93-70917
v.	)	T.C. No. 4755-92
COMMISSIONER OF	)	
INTERNAL REVENUE	)	MEMORANDUM*
SERVICE,	)	
Respondent-Appellee.	)	

Appeal from the United States Tax Court

Submitted June 21, 1994**

Before: TANG, PREGERSON, and T.G. NELSON, Circuit Judges.

Roger W. Knight appeals pro se the tax court's summary judgment for the Commissioner of the Internal Revenue Service (Commissioner") in Knight's petition challenging the Commissioner's determination of an income tax deficiency against Knight for the tax year 1989. We have jurisdiction pursuant to 26 U.S.C. §7482(a). We review de novo, see *Dial v. Commissioner*, 968 F. 2d. 898, 900 (9th Circ. 1992), and affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

** Pursuant to Ninth Circuit Rule 34-4, the panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Knight and his ex-wife were separated in 1987 and obtained a divorce in 1991. Knight's ex-wife retained custody of their three dependent children from the time they were separated. In 1989, Knight paid child support pursuant to a state court child support order. The total amount Knight paid constituted more than one-half of each child's support.

Knight claimed on his 1989 income tax return exemptions for his three children. The Commissioner disallowed these exemptions under 26 U.S.C. §152(e). Section 152(e) provides that a noncustodial parent such as Knight may claim exemptions for his dependent children only if he attaches to his tax return a written declaration signed by the custodial parent stating that the custodial parent will not claim the exemptions. See 26 U.S.C. §152(e). Knight failed to obtain the required declaration from his ex-wife.

In his petition for redetermination, Knight did not challenge the factual accuracy of the Commissioner's deficiency determination but, rather, challenged the constitutionality of section 152(e) on three grounds. First, Knight claimed that section 152(e) creates an unconstitutional irrebuttable presumption that the custodial parent has paid more than one-half of the child support. Second, Knight claimed that section 152(e) constitutes a bill of attainder. Third, Knight claimed section 152(e) violates his right to equal protection because ex-

spouses may deduct alimony payments but noncustodial parents may not deduct child support payments.

This court has recognized that the irrebuttable presumption doctrine has been severely limited. *See deLaurier v. San Diego Unified School Dist.*, 588 F. 2d. 674, 683, n. 16 (9th Cir. 1978). We have said that "(a)n irrebuttable presumption is not per se unconstitutional ... so long as it is rational." *Burlington N.R.R. v. Department of Pub. Serv. Reg.*, 763 F. 2d. 1106, 1113 (9th Cir. 1985); *accord Sakol v. Commissioner*, 574 F. 2d. 694, 698 (2d Cir.) (stating that "congressional judgments in the form of 'irrebuttable presumptions' in the economic area will be upheld where there is a rational relationship between the criteria set forth in the statutory mandate and a legitimate congressional purpose"), *cert. denied*, 439 U.S. 859 (1978). In *Burlington N.R.R.*, we also stated that "(a) statutorily defined irrebuttable presumption ... is not unconstitutional in statutes which regulate economic matters." 763 F. 2d. at 1113; see also *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 23-24 (1976); *Sakol,* 574 F. 2d. at 698.

Here, assuming that section 152(e) creates an irrebuttable presumption, the presumption is not unconstitutional.1/ Notwithstanding Knight's

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1/ Section 151 of the Internal Revenue Code allows a taxpayer to claim exemptions for dependent children. See 26

arguments to the contrary, the matter of determining which parent may claim a dependency exemption for tax purposes is economic. Moreover, as the tax court concluded, section 152(e) is rationally related to and advances a legitimate congressional purpose. See H.R. Rep. No. 432, 98th Cong., 2d Sess. 1498-1500, reprinted in 1984 U.S.C.C.A.N. 1139, 1139-1142 (explaining that treatment of custodial parent presumptively as providing over one-half of child support eases administrative burden on Internal Revenue Service with regard to parental disputes over dependency exemptions). Therefore, the tax court correctly held that section 152(e) does not create an unconstitutional irrebuttable presumption.

"A bill of attainder is 'a law that legislatively determines guilt and inflicts punishment upon an

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U.S.C. §151(c). Section 152(a) defines a dependent child as having received over half of his or her support from the taxpayer. See id. §152(a). Section 152(e)(1) provides in general that the custodial parent shall be treated as providing more than half the support for a dependent child. See id. §152(e)(1). Thus, the custodial parent generally is entitled to claim any exemptions for dependent children. See id. §§151, 152(a).

Section 152(e)(2) provides an exception to section 152(e)(1) by allowing the noncustodial parent to claim the exemption if "the custodial parent signs a written declaration ... that such custodial parent will not claim such child as a dependent" and "the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year." Id. §152(e)(2)(A),(B).

identifiable individual without provision of the protections of a judicial trial.'" *Antonio v. Wards Cove Packing Co.*, 10 F.3d. 1485, 1495 (9th Cir. 1993) (quoting *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 468 (1977)), pet. for cert. filed, 62 U.S.L.W. 3775 (U.S. May 2, 1994) (No. 93-1767); *see also Cracchiola v. Commissioner*, 643 F. 2d. 1383, 1385 n. 1 (9th Cir. 1981) (per curiam). Section 152(e) does not determine guilt; nor does it inflict punishment. *See Antonio*, 10 F. 3d. at 1495 (stating that statute inflicts forbidden punishment if it falls within "historical meaning of legislative punishment," "furthers no nonpunitive legislative goals," and "evinces Congress' intent to punish"). We do not agree with Knight that his inability to claim a tax deduction is punishment within the meaning of the Bill of Attainder Clause. *See id.* Therefore, the tax court correctly held that section 152(e) is not a bill of attainder.

Finally, the tax court correctly held that section 152(e) does not violate Knight's right to equal protection. Because this case does not involve a fundamental right and Knight is not a member either of a suspect or quasi-suspect class, the tax court correctly applied the rational basis test. *See Yao v. INS*, 2 F. 3d. 317, 321 (9th Cir. 1993); see also *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547 (1983). "Normally, a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated

to or perceived by the courts.'" *Licari v. Commissioner*, 946 F. 2d. 690, 692 (9th Cir. 1991) (quoting *United States v. Maryland Sav.-Share Ins. Corp.*, 400 U.S. 4, 6 (1970) (per curiam)). The party challenging the classification must carry the burden of showing it has no reasonable basis but is essentially arbitrary. *Id.*

As the tax court stated, a payer of alimony may deduct alimony payments because alimony payments are taxable to the recipient. See 26 U.S.C. §§ 71, 215. In contrast, child support payments are neither taxable to the recipient nor deductible by the payer. The tax court reasoned correctly that the difference in treatment of the two types of support is justified by their difference in nature, i.e., the purposes for which each type of support is paid. On appeal, Knight has not presented any argument that persuades us that this reasoning is flawed.[2/]

2/ In his briefs on appeal, Knight did not raise any arguments challenging the tax court's denial of his motion to revise the tax court's opinion. We therefore affirm the tax court's denial of Knight's motion to revise. We also affirm in all respects the other tax court orders designated in Knight's notice of appeal.

UNITED STATES TAX COURT

ROGER W. KNIGHT,	)	
Petitioner,	)	
v.	)	Docket No. 4755-92
COMMISSIONER OF	)	
INTERNAL REVENUE,	)	
Respondent.	)	

DECISION

Pursuant to the Court's Memorandum Opinion (T.C. Memo. 1992-710), filed December 15, 1992, and its December 18, 1992 Order, it is

ORDERED AND DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year 1989 in the amount of $1,375.00; and

Pursuant to the agreement of the parties in the above-entitled case, it is

ORDERED AND DECIDED: That there is no addition to tax due from the petitioner for the taxable year 1989, under the provisions of I.R.C. § 6662(c).

(Signed) L.W. Hamblen,
Judge.

Entered: OCT 18, 1993.

T.C. Memo. 1992-710

UNITED STATES TAX COURT

ROGER W. KNIGHT, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 4755-92. Filed December 15, 1992.

Roger W. Knight, pro se.
Cathy A. Goodson, for respondent.

MEMORANDUM OPINION

PATE, Special Trial Judge: This case came before the Court when respondent filed a Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted (under Rule 40) on May 7, 1992. At the hearing on respondent's motion, the parties submitted materials outside the pleadings; therefore, we treat respondent's motion as one for summary judgment under Rule 121.[1]

Respondent determined a deficiency in petitioner's 1989 Federal income taxes of $1,375 and imposed an accuracy-related penalty of $275. The deficiency resulted from the disallowance of four

1 All section references are to the Internal Revenue Code in effect for the year in issue. All Rule references are to the Tax Court Rules of Practice and Procedure.

exemptions claimed by petitioner (one for his wife and three for his children) and application of married filing separately tax rates to petitioner's taxable income. The accuracy related penalty resulted from respondent's determination that petitioner was negligent in the preparation of his income tax return.

In a "Complaint" filed March 2, 1992, and an amended petition, filed on April 3, 1992, petitioner contested respondent's determinations on the grounds that: (1) Section 152(e), which generally awards the dependency exemption for a child of divorced parents to the custodial parent, creates an irrebuttable presumption which is unconstitutional under the Due Process Clause of the Fifth Amendment to the Constitution of the United States; (2) section 152(e) is a bill of attainder prohibited by article I, section 9, clause 3 of the Constitution of the United States; and (3) the disparate tax treatment accorded alimony payments (deductible) and child support payments (not deductible) violates the equal protection embodied in the Fifth Amendment to the Constitution of the United States. He also claims that he is not subject to the accuracy related penalty provided for in section 6662. Petitioner resided in Federal Way, Washington, at the time he filed his petition.

On May 7, 1992, respondent filed her motion to dismiss for failure to state a claim in his petition upon which this Court could grant relief. At a hearing on the motion, held on June 15, 1992, in

Seattle, Washington, the parties orally stipulated to an exhibit (petitioner's 1989 Federal income tax return), which we have taken into account in arriving at this opinion. Consequently, we treat respondent's motion as one for summary judgment and dispose of it as provided in Rule 121. Rules 40, 121.

Under Rule 121(b), a motion for summary judgment is granted when it is shown "that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law." Either party may move for summary judgment in its favor on all or part of the issues in controversy. Rule 121(a). The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact. *Jacklin v. Commissioner*, 79 T.C. 340, 344 (1982); *Espinoza v. Commissioner*, 78 T.C. 412, 416 (1982). In considering a motion for summary judgment, we construe the facts in a manner most favorable to the party opposing the motion. *Naftel v. Commissioner*, 85 T.C. 527, 529 (1985).

The following facts, alleged by petitioner, are not disputed by respondent for purposes of the motion before us. Petitioner and his wife, Royanne M. Knight. were separated in July 1987 and divorced in July 1991. All of their children have lived with Mrs. Knight since their separation. During 1989, petitioner remitted monthly child support payments to Mrs. Knight, which payments constituted more than one-half of the support of the

children. Mrs. Knight refused to release the right to claim the dependency exemptions to petitioner.

For 1989, petitioner filed a Federal income tax return, which purported to be a joint return, on which he claimed five exemptions, one each for himself and his wife and three for their dependent children. He did not deduct the child support payments he made to his wife. In an attachment to the return, petitioner stated that his wife's signature was not on the return because she refused to sign it. Subsequently, in a notice of deficiency, respondent determined that petitioner was not entitled to four of the exemptions he had claimed and applied married filing separately tax rates to petitioner's income.

In her motion, respondent contends that the petitioner is not entitled to the dependency exemptions for the children even though he provided more than half of their support because he did not have custody of the children. Petitioner admits that section 152(e),2 in general, awards the dependency

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2 Section 152(e) which was amended by the Deficit Reduction Act of 1984, Pub. L. 98-369, sec. 423(a), 98 Stat.494, 799, and applies to tax years beginning after December 31, 1984, states:

(1) CUSTODIAL PARENT GETS EXEMPTION,-- Except as otherwise provided in this subsection, if--

(A) a child *** receives over half of his support during the calendar year from his parents--

(i) who are divorced or legally separated under a decree of divorce or separate maintenance,

exemptions for children of divorced parents to the custodial parent. However, he contends that section 152(e) is unconstitutional because it creates an "irrebuttable presumption" which violates the due process clause of the Fifth Amendment to the Constitution of the United States.

Basically, petitioner argues that the rule contained in section 152(e) (that the custodial parent

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(ii) who are separated under a written separation agreement, or

(iii) who live apart at all times during the last 6 months of the calendar year, and

(B) such child is in the custody of one or both of his parents for more than one-half of the calendar year,

such child shall be treated *** as receiving over half of his support during the calendar year from the parent having custody for a greater portion of the calendar year (hereinafter in this subsection referred to as the "custodial parent").

(2) EXCEPTION WHERE CUSTODIAL PARENT RELEASES CLAIM TO EXEMPTION FOR THE YEAR.--A child of parents described in paragraph (1) shall be treated as having received over half of his support during a calendar year from the noncustodial parent if--

(A) the custodial parent signs a written declaration *** that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and

(B) the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year.

For purposes of this subsection, the term "noncustodial parent" means the parent who is not the custodial parent.

shall be treated as having provided over half of a child's support) constitutes an irrebuttable presumption which unconstitutionally deprived him of his right to present evidence proving that he, the noncustodial parent, is entitled to the exemptions. He cites *Heiner v. Donnan*, 285 U.S. 312 (1932), in support of his argument. An irrebuttable presumption is defined in *Heiner v. Donnan*, supra at 324, as a presumption which is "incapable of being overcome by proof of the most positive character." In that case, the Supreme Court declared unconstitutional a gift tax provision which presumed that gifts made within 2 years of a donor's death were made in contemplation of death. Petitioner contends that section 152(e) "presumes" that the custodial parent provided more than one-half of the children's support and operates to award the dependency exemptions to the custodial parent even if the noncustodial parent provided all of the children's support.

However, subsequent Supreme Court decisions have narrowed the scope of the doctrine laid down in *Heiner v. Donnan, supra.* See *Usery v. Turner Elkhorn Mining Company*, 428 U.S. 1 (1976); *Weinberger v. Salfi*, 422 U.S. 749 (1975); see also *Kolom v. Commissioner*, 644 F. 2d. 1282 (9th cir 1981); *deLaurier v. San Diego Unified School Dist.*, 588 F. 2d. 674, 683 n. 16 (9th Cir. 1978); *B.G.M. Enterprises v. Harris*, 482 F. Supp. 1073 (1980). With regard to economic matters, the

current status of the doctrine was analyzed extensively (in its review of a tax case) by the Second Circuit in *Sakol v. Commissioner*, 574 f. 2d. 694 (2d Cir. 1978), affg. 67 T.C. 986 (1977). Based on that analysis, the Second Circuit concluded that "congressional judgments in the form of 'irrebuttable presumptions' in the economic area will be upheld where there is a rational relationship between the criteria set forth in the statutory mandate and a legitimate congressional purpose." *Sakol v. Commissioner, supra* at 698; see also *Sjoroos v. Commissioner*, 81 T.C. 971, 973 (1983). Generally, the alleviation of :administrative burdens and practical problems of enforcement" constitutes a legitimate congressional purpose. *Bryant v. Commissioner*, 72 T.C. 757, 766 (1979).

Prior to Congress' amendment of section 152(e),3 in the case of children of divorced parents,

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3 Prior to amendment, section 152(e) read as follows:

(1) GENERAL RULE.--If--

(A) A child *** receives over half of his support during the calendar year from his parents who are divorced or legally separated under a decree of divorce or separate maintenance, or who separated under a written separation agreement, and,

(B) such child is in the custody of one or both of his parents for more than one half of the calendar year, such child shall be treated, for purposes of subsection (a), as receiving over half of his support during the calendar year from the parent having custody for a greater portion of the

the custodial parent generally was treated as having provided more than one half of the support for each child during the calendar year and entitled to a dependency exemption for each of them. Sec.

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calendar year unless he is treated, under the provisions of paragraph (2), as having received over half of his support for such year from the other parent (referred to in this subsection as the parent not having custody).

(2) SPECIAL RULE.--The child of parents described in paragraph (1) shall be treated as having received over half of his support during the calendar year from the parent not having custody if--

(A)(i) the decree of divorce or of separate maintenance, or a written agreement between the parents applicable to the taxable year beginning in such calendar year, provides that the parent not having custody shall be entitled to any deduction allowable under section 151 for such child, and

(ii) such parent not having custody provides at least $600 for the support of such child during the calendar year, or

(B)(i) the parent not having custody provides $1,200 or more for the support of such child (or if there is more than one such child, $1,200 or more for each of such children) for the calendar year, and

(ii) the parent having custody of such child does not clearly establish that he provided more for the support of such child during the calendar year than the parent not having custody.

For purposes of this paragraph, amounts expended for the support of a child or children shall be treated as received from the parent not having custody to the extent that such parent provided amounts for such support.

152(e)(1); *Labay v. Commissioner*, 55 T.C. 6, 10 (1970), affd. per curiam 450 F. 2d. 280 (5th Cir. 1971). However, an exception to this general rule provided that the noncustodial parent was entitled to the exemptions if such parent provided $1,200 or more for the support of each child and the custodial parent did not "clearly establish" the amount of support, the custodial parent had to show, by a clear preponderance of the evidence, that he or she provided more support for each child than the noncustodial parent. *Pierce v. Commissioner*, 66 T.C. 840, 849 (1976); *Labay v. Commissioner*, *supra* at 13. Sec. 1.152-4(d)(3), Income Tax Regs. As a result, when a dependency exemption of a child of divorced parents was in dispute, the IRS was forced to examine conflicting evidence to discern which parent provided the requisite amount of support in order to determine which of them was entitled to the dependency exemption. See, e.g., *McGuire v. Commissioner*, 77 T.C. 765 (1981); *McCaskill v. Commissioner*, 77 T.C. 689, 694 (1981); *Brown v. Commissioner*, 48 T.C. 42, 43 (1967).

Congress explained its purpose for changing section 152(e) in H. Rept. 98-432 (Part I) at 197 (1984). In that report, it stated that the prior statutory framework for awarding dependency exemptions for children of divorced parents was

> often subjective and present difficult problems of proof and substantiation. The

> Internal Revenue Service became involved in many disputes between parents who both claim the dependency exemption based on providing support over the applicable thresholds. *** The Committee wished to provide more certainty by allowing the custodial spouse the exemption unless that spouse waives his or her right to claim the exemption. Thus, dependency disputes between parents will be resolved without the involvement of the Internal Revenue Service.

In other words, in enacting the current version of section 152(e), Congress sought to eliminate the role of the Internal Revenue Service (hereinafter IRS) as mediator between parents in disputes over which parent is entitled to the dependency exemption. To accomplish this task, Congress enacted a statute which, as a general rule, awards the dependency exemption to the custodial parent by treating that parent as the provider of over one half of the child's support. The exemption may be transferred to the noncustodial parent, however, if the custodial parent signs a written declaration to that effect in conformity with section 152(e)(2). Because this statutory scheme eases the administrative burden of the IRS and thereby advances enforcement of the statute in a rational way, it furthers a legitimate congressional purpose. Accordingly, we hold that section 152(e) does not violate the due process clause of the Fifth

Amendment to the Constitution of the United States. See *Bryant v. Commissioner*, 72 T.C. 757, 766-767 (1979).

Next, respondent contends that petitioner erred in alleging that section 152(e) constitutes a bill of attainder. A bill of attainder is a legislative act that determines guilt and punishes identifiable individuals without a judicial trial. See *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *Cracchiola v. Commissioner*, 643 F. 2d. 1383 (9th Cir. 1981), affg. per curiam T.C. Memo. 1979-3, T.C. Memo 1979-11, T.C. Memo. 1979-13; *Barr v. Commissioner*, 51 T.C. 693, 695-696 (1969). The purpose of the bill of attainder clause is to ensure that the responsibility of deciding an individual's guilt or innocence is reserved for an independent judicial branch, and is not usurped by the legislative branch of Government. *United States v. Brown*, 381 U.S. 437 (1965); *Connolly v. Commissioner*. T.C. Memo. 1977-62.

In arguing that section 152(e) is a bill of attainder, petitioner assumes, as an underlying premise, that section 152(e) inflicts "punishment" upon noncustodial parents. However, Federal income taxation is not a "punishment" for some sort of wrongdoing. Rather, it is a law to raise revenue to run the Government, and all persons who are within the ambit of the law and have sufficient income are subject to such taxation. Consequently, "It is wholly irrelevant to speak of a bill of attainder

in *** (a) civil proceeding involving *** (a taxpayer's) income tax liability." *Johnson v. Commissioner*, T.C. Memo. 1978-32, affd. without published opinion 624 F. 2d. 192 (9th Cir. 1980).

Moreover, the basis on which the income tax is computed is the gross income of the taxpayer. Enactment of deductions and exemptions to reduce the amount of that income as a basis for taxation is strictly within congressional discretion and Congress may grant as many or as few deductions to whomever it deems appropriate just as long as it serves a legitimate purpose of the legislative branch. *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934).

In enacting section 152(e), Congress determined that it generally would award the dependency exemption for a child of divorced parents to the custodial parent. That determination in no way constitutes a pronouncement of guilt nor inflicts any punishment. It simply awards a tax benefit to the custodial parent, a matter properly within Congress' discretion. For these reasons, we hold that section 152(e) does not constitute a bill of attainder.

Finally, in his petition, petitioner contends that he should be allowed to deduct the full amount he remitted to his wife for child support in the same manner as alimony payments are deductible. He claims that the disparate treatment of alimony as compared with child support violates the Due

Process Clause of the Fifth Amendment. In her motion, respondent contends that petitioner's analogy is an incorrect one and, that in considering petitioner's child support payments, we should take into account that no parent is allowed to deduct the amount expended to support his or her child.

It is well settled that the due process clause of the Fifth Amendment embraces the principles of the Equal Protection Clause of the Fourteenth Amendment with regard to Federal enactments. *Johnson v. Robison,* 415 U.S. 361, 364-365 n. 4.(1974); *Shapiro v. Thompson*, 394 U.S. 618, 641-642 (1969). In evaluating whether a Federal statute violates equal protection, we must use a "strict Scrutiny" standard when the statute: (1) Impermissibly interferes with the exercise of a fundamental right, or (2) operates to the particular disadvantage of a suspect class. See *Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983); *Massachusettes Bd. of Retirement v. Murgis*, 427 U.S. 307, 312 (1976); *San Antonio Independent school Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

Petitioner argues that the strict scrutiny standard must be used in this case because the statute "discriminates against taxpayers who exercised the fundamental right to procreate" and that "decisions concerning the exercise of this fundamental right are best made by individuals without interference by government in a free society." Petitioner's argument misses the point.

this statute creates no impermissable interference with the right to have children. Rather, this statute awards the exemptions to one of the persons that exercised such right to procreate. Nor does the statute implicate any suspect class. It applies regardless of the race or sex of the custodial parent, of the noncustodial parent, and of the child.

Because no fundamental right or suspect class is involved in this case, we apply a rational basis standard. Under such standard, a deduction does not violate the equal protection clause" if any state of facts rationally justifying it is demonstrated to or perceived by the courts." *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970); see *Regan v. Taxation with Representation, supra*; *Sjoroos v. Commissioner*, 81 T.C. 971 (1983); *Keeler v. Commissioner*, 70 T.C. 279, 285-286 (1978).

In general, a payor of alimony or separate maintenance may deduct amounts paid, but the recipient must include such payments in gross income. Secs. 71, 215. These provisions relieve the payor of the liability for income tax on the amount transferred to the other parent, but impose that burden on the person receiving and enjoying the benefit of the alimony. H. Rept. 98-432 (Part I) at 194 (1984).

In contrast, child support payments are neither deductible by the payor nor taxable to the recipient. Petitioner argues that the recipient of his child

support payments (Mrs. Knight) should bear the burden of tax because she gets the benefit of the income. Moreover, petitioner maintains that denying the parent paying the child support exhibits "a willingness by Congress to invidiously discriminate against noncustodial parents."

However, petitioner, in his argument, fails to take into account that the child support money he pays to Mrs. Knight goes toward the support of their children, not for her benefit or enjoyment as is the case of alimony. He further fails to take into account that personal, living, and family expenses (including the cost of supporting one's child) are not deductible by any taxpayer. Sec. 262. Consequently, no parent may deduct the cost of supporting his or her child' no distinction is made between parents who are married or unmarried, parents who are married to each other or to others, or parents having or not having custody of the child. Therefore, in his capacity as a parent supporting his children, petitioner is subject to the same rules which apply to all parents. It is obvious then that the difference in treatment between alimony and child support does not discriminate against noncustodial parents and does not violate equal protection.

Lastly, in his petition, petitioner raised the propriety of respondent's determination in the notice of deficiency that he was negligent and therefore subject to the section 6662 accuracy related penalty. In respondent's motion for summary judgment,

however, other than asking the Court to award respondent such amount, respondent failed to address the allegation. Moreover, respondent failed to present any arguments in support of such award in her memorandum of law.

In considering a motion for summary judgment, we must construe the facts in a manner most favorable to the opposing party, in this case the petitioner. because respondent failed to sufficiently raise the issue of petitioner's negligence, petitioner was not afforded an opportunity to present arguments that he was not negligent. Moreover, because respondent failed to enlighten us as to what facts were taken into account in her determination that petitioner was negligent, at this point we could only guess what facts she wants us to consider. Because of respondent's failure to adequately raise an argue the issue of the accuracy related penalty in her motion for summary judgment, we decline to uphold such determination at this juncture.

To reflect the foregoing,

An appropriate order granting partial summary judgment for respondent will be issued.